



Virginia  
Regulatory  
Town Hall

## Proposed Regulation Agency Background Document

<b>Agency Name:</b>	State Water Control Board
<b>VAC Chapter Number:</b>	9 VAC 25-770- 10 et seq
<b>Regulation Title:</b>	Virginia Financial Responsibility Requirements for Mitigation Associated with Tidal Dredging Projects
<b>Action Title:</b>	Financial Assurances for Tidal Dredging Project Mitigation

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

### Summary\*

*Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

The purpose of the proposed regulation is to specify the mechanisms by which the State Water Control Board may require demonstration of financial responsibility for the completion of compensatory mitigation requirements for dredging projects in tidal waters permitted under the Virginia Water Protection Permit (VWPP) Program. Financial responsibility may be demonstrated by a letter of credit, certificate of deposit, or performance bond. When the U.S. Army Corps of Engineers requires demonstration of financial responsibility, then the mechanism and amount approved by the Corps shall be used to meet this requirement. This proposed regulation will replace the emergency regulation that became effective on December 4, 2002.

### Basis\*

*Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.*

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The basis for this regulation is amendments to Section 62.1-44.15 5(c) of the Code of Virginia, passed by the 2002 General Assembly (HB91/SB 327), as follows:

*(5c) Any certificate issued by the Board under this chapter relating to dredging projects governed under Chapter 12 (§ [28.2-1200](#) et seq.) or Chapter 13 (§ [28.2-1300](#) et seq.) of Title 28.2 may be conditioned upon a demonstration of financial responsibility for the completion of compensatory mitigation requirements. Financial responsibility may be demonstrated by a letter of credit, a certificate of deposit or a performance bond executed in a form approved by the Board. If the U.S. Army Corps of Engineers requires demonstration of financial responsibility for the completion of compensatory mitigation required for a particular project, then the mechanism and amount approved by the U.S. Army Corps of Engineers shall be used to meet this requirement.*

### Purpose\*

*Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.*

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### Substance\*

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.*

This regulation specifies the mechanisms by which the Board may require such financial assurances to ensure completion of mitigation requirements for tidal dredging projects, but would allow that this requirement could be satisfied by bonding required by the Corps, to avoid duplication. These requirements would apply only to tidal dredging projects and not to non-tidal dredging projects or any other types of projects requiring VWP permits.

### Issues\*

*Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.*

VWP permits require compensatory mitigation for unavoidable impacts to tidal wetlands and subaqueous bottoms disturbed by dredging activities. In some cases, particularly when multiple property owners are involved in dredging of coves for boating access, these mitigation projects are not completed due to a lack of financial resources or clear responsibility. The U.S. Army Corps of Engineers sometimes but not always requires bonding to ensure project completion. The advantage to the public and the Commonwealth of having this regulation in place is ensuring that mitigation projects for tidal dredging projects are completed at no expense to the Commonwealth or to the general public. There are no disadvantages to the public or the Commonwealth.

### Locality Particularly Affected\*

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

Areas in Tidewater Virginia are particularly affected by the proposed regulation. This regulation applies only to persons required to obtain or modify a VWP permit pursuant to the VWP Regulation, 9 VAC 25-210-10 et seq., for completion of dredging projects in tidal waters governed under Chapter 12 (Section 28.2-1200 et seq.) or Chapter 13 (Section 28.2-1300 et seq.) of Title 28.2 of the Code. The Department of Environmental Quality anticipates that this regulation will affect less than ten applicants per year.

## Public Participation\*

*Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal.*

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In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal and the impacts of the regulation on farm or forest lands.

Anyone wishing to submit written comments for the public comment file may do at the public hearing or by mail. Written comments should be signed by the commenter and include the name and address of the commenter. In order to be considered the comments must be received by the close of the comment period. Oral comments may be submitted at the public hearing.

## Fiscal Impact

*Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; e) the projected cost of the regulation for affected individuals, businesses, or other entities; and f) an estimate of the impact of the proposed regulation upon small businesses as defined in § 9-199 of the Code of Virginia or organizations in Virginia.*

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There would be no significant costs to the Department of Environmental Quality associated with implementation of this regulation, and any additional costs could be funded from existing resources. Any person or persons conducting tidal dredging projects that are permitted by a VWP permit and require compensation will be affected by this regulation and will have to provide financial assurance, with the exception of state and federal government entities. This regulation is expected to impact less than ten permittees per year; some of them may be small businesses.

## Detail of Changes

*Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.*

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This is a new regulation. This regulation specifies the mechanisms by which the Board may require such financial assurances to ensure completion of mitigation requirements for tidal dredging projects, but would allow that this requirement could be satisfied by bonding required by the Corps, to avoid duplication. Several changes to the emergency regulation enacted in

December 2002 were made by DEQ staff in response to further internal review. Unnecessary definitions were removed, an exemption for state and federal government projects was added, and compliance dates were modified to allow DEQ staff more time to review the financial assurance documents prior to project onset. In addition, the means to transfer financial assurance with transfer of the permit and the mechanism by which purchase of mitigation bank credits or in lieu of fee contributions satisfy the regulation were clarified.

### Alternatives

*Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.*

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The alternative of not developing a regulation for the provision of financial assurances for mitigation for tidal dredging projects is not feasible as this regulatory development is mandated by action of the 2002 General Assembly. We are avoiding unnecessary duplication by including the provision that no additional financial assurances will be required if other regulatory entities are already requiring such assurances.

### Public Comment

*Please summarize all public comment received during the NOIRA comment period and provide the agency response.*

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No public comments were received.

### Clarity of the Regulation

*Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.*

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DEQ, through examination of the regulation, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

### Periodic Review

*Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.*

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DEQ will review this regulation four years after its effective date to determine if it has been effective in assuring that compensatory mitigation for tidal dredging projects is successfully completed.

### Family Impact Statement

*Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

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The regulation is not expected to have any impact on the institution of the family and family stability. However, in the event a community association conducting a tidal dredging project were unable to complete the work, the regulation would have a beneficial effect on families in that with financial assurance in place, individual property owners would not be held liable for completion of the work.